Supreme Court, U.S.
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No. 91-1430

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

TEXACO INC.,

Petitioner,

v.

DIANA L. MASON, Individually and as Administrator of the Estate of Otis W. Mason, Deceased,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Was the jury's punitive damages award of $25,000,000 constitutionally defective because the award was subject only to limited post-trial review for "excessiveness" under a "shock the conscience" test, instead of the rigorous post-trial review of objective factors approved in *Haslip*?

2. Did Plaintiff's failure to cross-appeal the adverse jury verdict on her punitive damages claim in the first trial preclude her from relitigating her claim for punitive damages in the second trial?

RULE 29.1 STATEMENT

Pursuant to Rule 29.1 of the Rules of this Court, the following is a list of affiliated corporate entities of the Petitioner:

Four Star Oil and Gas Company
Texaco Cogeneration Company
Texaco Pipeline Inc.
Texaco Exploration and Production Inc.
Texaco Refining and Marketing Inc.
Texaco Refining and Marketing (East) Inc.
Texaco TPC Inc.
Texaco Trading and Transportation Inc.
Texaco A/S
Texaco Britain Limited
Texaco Denmark Inc.
Texaco Investments (Netherlands), Inc.
Texaco Limited
Texaco North Sea U.K. Company
Texaco Brasil S.A. Productos de Petroleo
Texaco Panama Inc.
Texas Petroleum Company
Getty Oil Company
Texaco Chemical Company
Texaco International Trader Inc.
Texaco Overseas Holdings Inc.
TRMI Holdings Inc.

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Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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PETITION FOR A WRIT OF CERTIORARI

Texaco Inc. respectfully petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The opinion of the Tenth Circuit in *Mason v. Texaco Inc.*, 948 F.2d 1546 (10th Cir. 1991) (*Mason II*), is included in Appendix A, 1a. The District Court's opinion denying Texaco's motion for judgment notwithstanding the verdict or a new trial, reported at 741 F. Supp. 1472

(D. Kan. 1990), is included in Appendix B, 33a. The District Court's unreported ruling denying the admission of evidence regarding the profitability of Texaco's conduct is included in Appendix C, 125a.

The unreported Order of the Tenth Circuit denying Texaco's petition for writ of mandamus on the issue of the retrial of punitive damages in the second trial is included in Appendix D, 128a. The District Court's opinion permitting plaintiff to retry punitive damages in the second trial, reported on LEXIS at No. 78-1337-T, 1989 U.S. Dist. LEXIS 7825 (D. Kan. June 19, 1989), is included in Appendix E, 129a.

The opinion of the Tenth Circuit after the first trial, reported at 862 F.2d 242 (10th Cir. 1988) (*Mason I*), is included in Appendix F, 134a. The District Court's unreported opinion after the first trial denying plaintiff's motion for a new trial on punitive damages is included in Appendix G, 149a.

JURISDICTION

The Tenth Circuit entered its judgment on November 18, 1991, and denied Texaco's timely Petition for Rehearing And Suggestion For Rehearing *En Banc* on January 14, 1992. App. 168a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND RULE OF PROCEDURE

The Due Process Clause of the Fifth Amendment to the United States Constitution provides in pertinent part: "No person shall . . . be deprived of life, liberty or property without due process of law. . . ."

The Seventh Amendment to the United States Constitution provides in pertinent part: "In suits at common law . . . the right of jury trial shall be preserved, and no fact tried by a jury shall be otherwise reexamined in any Court of the United States, than according to the rules of the Common law."

The Due Process Clause of the Fourteenth Amendment to the United States Constitution provides in pertinent part: "[N]or shall any state deprive any person of life, liberty or property, without due process of law."

Federal Rule of Civil Procedure 59 provides in relevant part as follows:

> A new trial may be granted to all or any of the parties and on all or part of the issues . . . in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States. . . .

STATEMENT OF THE CASE

The facts are not at issue in this Petition. Coast Guard instructor Otis Mason was exposed to benzene, developed leukemia, and died. His widow pursued this products liability action against Texaco and other defendants in the District Court for the District of Kansas. The basis of jurisdiction was diversity of citizenship.

Among the defendants was the benzene producer, Texaco, which stood at the opposite end of a long chain of distribution from the ultimate user, Mr. Mason. Texaco sold the benzene in bulk with written product warnings. The trial record reflects that the benzene was repackaged and resold by several chemical purveyors without Texaco's warnings. Eventually the U.S. Coast Guard purchased the benzene as a part of kits used for testing marine engine oil.

The Coast Guard directed Mr. Mason on numerous occasions to conduct classes on the use of the testing kits, which led to his exposure to benzene. Mr. Mason was neither told that the benzene in the kits was dangerous, nor ever given the Coast Guard's own manuals which set forth the proper procedures for the safe handling of benzene.

There have been two jury trials of this case. In the first trial, the jury found for Plaintiff on the issue of

compensatory damages and apportioned the fault among several of the Defendants (as well as a small percentage to Mr. Mason). The jury awarded total compensatory damages of $9,000,000. The district court, pursuant to Fed. R. Civ. P. 49, posed a special interrogatory to the jury that asked: "Do you find by a preponderance of the evidence that an award of punitive damages against defendant Texaco Inc. is appropriate, as defined in the Court's instructions?" App. 173a. The jury said no.

Plaintiff unsuccessfully moved for a new trial on the punitive damages claim, App. 149a, but did not thereafter appeal. Texaco did appeal and won a reversal. The mandate from the Tenth Circuit stated: "The judgment *against Texaco* is REVERSED, and the case is REMANDED for a new trial." App. 148a; 862 F.2d at 250 (emphasis added).

This victory was short-lived, as the second jury awarded approximately the same amount of compensatory damages ($9,025,000) and found Texaco entirely at fault. Moreover, the district court permitted Plaintiff to revive the punitive damages claim in the second trial, just as if Plaintiff had won her motion for a new trial after the first jury rejected that claim. App. 132a. Texaco unsuccessfully tried to stop the retrial of punitive damages by seeking a writ of mandamus from the Tenth Circuit. App. 128a.

The claims, the jury instructions on punitive damages, the judge, the lawyers, and the courtroom were the same in both trials. The second jury, unlike the first, held Texaco liable for punitive damages in the amount of $25,000,000.

In the second trial, the district court, over Texaco's objections, admitted evidence of Texaco's net worth and annual earnings in connection with the punitive damages claim. App. 125a. The district court, however, refused to allow Texaco to introduce evidence showing profits derived from the sale of benzene alone. *Id.*

The district court denied Texaco's motion for judgment notwithstanding the verdict or for a new trial, App. 33a, and Texaco again appealed. On December 9, 1991, the Tenth Circuit affirmed the revival and imposition of punitive damages in the second trial but ordered a remittitur of the amount to $12,500,000. App. 7a-14a; 948 F.2d at 1550-54. The Tenth Circuit reviewed the punitive damages verdict solely under a traditional "shock the conscience" standard. App. 29a-31a; 948 F.2d at 1561.

The Tenth Circuit denied Texaco's timely Petition for Rehearing and Suggestion for Rehearing *En Banc* on January 14, 1992.

REASONS FOR GRANTING THE WRIT

I. SUMMARY

Even though the present case involves a tragic death, it is nonetheless a typical product liability action similar to dozens of others pending in the district courts of all circuits. Punitive damages in those cases are receiving widely disparate post-trial review, depending solely on the accident of geography.

This case presents this Court with the opportunity to resolve an important conflict among the circuit courts that has been spawned in the wake of *Pacific Mutual Life Insurance Co. v. Haslip*, 111 S. Ct. 1032 (1991). The circuit courts have taken three different approaches to *Haslip*: The Tenth Circuit in this case, and the Fifth Circuit, have interpreted *Haslip* not to require any fundamental change in the traditional "shock the conscience" standard for post-trial review of punitive damages awards. (In *Haslip* itself, this Court suggested that the traditional standards do not satisfy due process. 111 S. Ct. at 1045 n.10.)

In contrast, the Eighth and Eleventh Circuits, and one panel of the Fourth Circuit, have interpreted *Haslip* to require a detailed and substantive review of punitive

damages awards based on the objective factors identified in *Haslip*.

Finally, another panel of the Fourth Circuit, in a striking opinion by Judge Niemeyer, held that a *Haslip* post-verdict review cannot be undertaken in federal court because of the Seventh Amendment and Fed. R. Civ. P. 59. Instead, under this third approach, the federal jury must be instructed on the *Haslip* factors.

This case is the best possible vehicle for consideration of the conflict over the application of *Haslip* in diversity cases: The Tenth Circuit was faced with a jury verdict of $25,000,000 in punitive damages, where an earlier jury in the same case, under the same instructions, had found *no* punitive damages. (This is an extreme example of the "disparate outcomes" Justice Kennedy noted in his concurring opinion in *Haslip*, 111 S. Ct. at 1055.) The jury, over objection, only heard evidence of Texaco's total wealth and income, and obviously the Plaintiff had a "windfall because [she had] the good fortune to have a defendant with a deep pocket." *Haslip*, 111 S. Ct. at 1045. The Tenth Circuit addressed *Haslip* but applied the traditional "shock the conscience" test, cutting the verdict in half by a remittitur.

There is another facet of this case, and another conflict, that warrants review by this Court: The Tenth Circuit is in conflict with the Eighth and the Fourth Circuits on the effect of an appellee's failure to cross-appeal when the case is returned to the district court for a new trial. Here the failure to cross-appeal involves punitive damages, but the same question arises in many different types of cases that are remanded for a new trial, as well as other contexts where collateral estoppel and *res judicata* are applied based upon the same considerations of finality and fairness.

Giving finality to judgments is an important principle because it implicates fundamental fairness to litigants.

Resolution of the conflict presented by this case would make for uniform results among the circuits. More importantly, a decision by this Court would also materially increase the fairness and efficiency of the judicial system by preventing litigants from sitting out the appellate process in the hope that a remand for a new trial may revive a dead claim.

II. THIS COURT SHOULD RESOLVE THE CONFLICT AMONG THE CIRCUITS ON THE PROPER STANDARD OF REVIEW OF PUNITIVE DAMAGES AWARDS IN DIVERSITY CASES

The starting point for any analysis of the due process limits on jury awards of punitive damages is this Court's decision in *Pacific Mutual Life Insurance Co. v. Haslip*, 111 S. Ct. 1032 (1991). That case established that the Due Process Clause imposes meaningful constraints on punitive damages awards:

> unlimited jury discretion—or unlimited judicial discretion for that matter—in the fixing of punitive damages may invite extreme results that jar one's constitutional sensibilities. . . . [G]eneral concerns of reasonableness and adequate guidance from the Court when the case is tried to a jury properly enter into the constitutional calculus.

Id. at 1043.

Although *Haslip* approved the Alabama punitive damages scheme under due process, the Court's approval depended substantially on its determination that Alabama's structured post-trial review of punitive damages awards checked the "significant discretion" given the jury to determine punitive damages. *Id.* at 1044. This post-verdict review "ensures that punitive damages awards are not grossly out of proportion to the severity of the offense and have some understandable relationship to compensatory damages." *Id.*

This Court noted that the "detailed and substantive" Alabama post-trial review of objective factors distin-

guished Alabama law from the Vermont and Mississippi schemes that provided for post-trial review of punitive damages awards only for "excessiveness" and jury "bias." *Id.* at 1045 n.10. Several Justices had criticized this limited review in the earlier cases of *Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. 71 (1988) and *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257 (1989). 111 S. Ct. at 1045 n.10.

Following *Haslip*, this Court granted certiorari in twelve cases that presented questions similar to *Haslip* and summarily remanded those cases for reconsideration in light of *Haslip*.[1] This action by the Court in these

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[1] In five of the cases remanded by this Court, the punitive damages judgments have been reaffirmed by the lower courts. *Eichenseer v. Reserve Life Ins. Co.*, 111 S. Ct. 1298 (1991), *on remand*, 934 F.2d 1377 (5th Cir. 1991); *Hospital Auth. of Gwinnett County v. Jones*, 111 S. Ct. 1298 (1991), *on remand*, 409 S.E.2d 501 (1991), *cert. denied*, 60 U.S.L.W. 3578 (U.S. Feb. 24, 1992); *Southern Life & Health Ins. Co. v. Turner*, 111 S. Ct. 1678 (1991), *on remand*, 586 So.2d 854 (1991); *Transamerica Occidental Life Ins. Co. v. Koire*, 111 S. Ct. 2253 (1991), *on remand*, No. B036342, slip op. (Cal. Ct. App. Sept. 20, 1991); *Jordan v. Clayton Brokerage Co.*, 111 S. Ct. 1298 (1991), *on remand*, No. 87-1312, slip ops. (8th Cir. June 10 and 21, 1991) (remanding to district court for further consideration), *on remand*, No. 82-1107-CV-W-9, slip op. (W.D. Mo. Oct. 9, 1991), *appeal docketed*, No. 91-3606WMKC (Nov. 6, 1991).

Two courts reversed the award of punitive damages and remanded the cases for further proceedings. *George v. International Soc'y for Krishna Consciousness*, 111 S. Ct. 1299 (1991), *on remand*, 1992 Cal. App. LEXIS 105 (Cal. Ct. App. Jan. 30, 1992); *Fleming Landfill, Inc. v. Garnes*, 111 S. Ct. 2882 (1991), *on remand*, 1991 W.Va. LEXIS 215 (W.Va. Dec. 5, 1991).

Four of the remanded cases are still pending in the lower courts. *Pacific Lighting Corp. v. MGW, Inc.*, 111 S. Ct. 1299 (1991); *Intercontinental Life Ins. Co. v. Lindblom*, 111 S. Ct. 1575 (1991); *Wollersheim v. Church of Scientology*, 111 S. Ct. 1298 (1991); *AMCA Int'l Fin. Co. v. Hilgedick*, 111 S. Ct. 1614 (1991).

Finally, one of the remanded cases was dismissed subsequent to settlement by the parties. *Post Office v. Portec, Inc.*, 111 S. Ct. 1299 (1991), *vacated and appeal dismissed on remand*, 935 F.2d 1105 (10th Cir. 1991).

twelve cases shows that, while Alabama's procedures satisfy due process, any less rigorous procedures may not. A decision by this Court in this case is warranted in order that litigants in the different circuits receive similar treatment in punitive damages cases. As matters now stand, a punitive damages award that survives post-trial review in the Tenth or Fifth Circuits might well be set aside in the Fourth, Eighth, or Eleventh Circuits.

The post-*Haslip* circuit court decisions fall into three camps: (1) cases that effectively ignore *Haslip* by suggesting that the deferential post-trial review for excessiveness that "shocks the conscience" satisfies *Haslip* and due process, *Mason v. Texaco Inc.*, 948 F.2d 1546 (10th Cir. 1991) *(Mason II)*; *Eichenseer v. Reserve Life Ins. Co.*, 934 F.2d 1377 (5th Cir. 1991); (2) cases holding that due process and *Haslip* require a rigorous post-trial review of punitive damages awards to check significant jury discretion, *Johnson v. Hugo's Skateway*, 949 F.2d 1338 (4th Cir. 1991); *Robertson Oil Co. v. Phillips Petroleum Co.*, 930 F.2d 1342 (8th Cir. 1991); and *American Employers Ins. Co. v. Southern Seeding Services, Inc.*, 931 F.2d 1453 (11th Cir. 1991); and (3) a case holding that the Seventh Amendment precludes *Haslip*-style post-trial review, but that due process requires that *Haslip* factors be included in the instructions to the jury, *Mattison v. Dallas Carrier Corp.*, 947 F.2d 95 (4th Cir. 1991).

The Fifth and Tenth Circuits fall into a distinct group with respect to post-*Haslip* circuit court decisions. In *Mason II*, the Tenth Circuit rejected Texaco's due process challenge to the $25,000,000 punitive damages award in the second *Mason* trial. In an opinion by Judge Barrett, joined by Chief Judge McKay and Judge Brorby, the court reviewed the district court's judgment award to determine whether the punitive damages award was "so excessive . . . as to shock the judicial conscience and to raise

an irresistible inference that passion, prejudice, corruption or other improper cause invaded the trial . . . ." *Mason II*, 948 F.2d at 1558.

This post-trial review for "excessiveness" and "passion, prejudice or bias"—which itself relies on vague, contentless and subjective standards such as whether the award "shocks the judicial conscience"—falls far short of the Alabama system of rigorous post-trial review that this Court approved in *Haslip*.

The Tenth Circuit, it is true, did find that the $25,000,000 punitive award "was so excessive as to shock our judicial conscience." 948 F.2d at 1560. The Tenth Circuit then remitted the punitive award to $12,500,000 but without any analysis of how $25,000,000 shocked the conscience when compared to the original punitive award of zero, while $12,500,000 somehow lacked conscience-shocking qualities. This application of the "shock the conscience" test violates due process because it fails to "provide for a rational relationship in determining whether a particular award is greater than reasonably necessary to punish and deter." *Haslip*, 111 S. Ct. at 1045-46.

The Fifth Circuit has joined the Tenth Circuit in limiting appellate review to a traditional "excessiveness" determination. In *Eichenseer v. Reserve Life Insurance Co.*, 934 F.2d 1377 (5th Cir. 1991), the Fifth Circuit (on remand from this Court after *Haslip*) upheld a punitive damages award under Mississippi law. In that case, where the award was made by the district court sitting without a jury, the Fifth Circuit interpreted *Haslip* to require only "some meaningful procedural assurance that the amount of the award is not *an impulsive reaction*." 934 F.2d at 1385 (emphasis added). Under the Fifth Circuit's reading of *Haslip*, a punitive damages award is valid only if it is "reasonable," but the court set a low benchmark for reasonableness: "If there are *any* circumstances of probative force that support the amount of the

award, then the award meets the 'reasonableness' prong of the due process test in *Haslip.*" 934 F.2d at 1382.

In sharp contrast, the Fourth Circuit, *Johnson v. Hugo's Skateway*, 949 F.2d 1338 (4th Cir. 1991), the Eighth Circuit, *Robertson Oil Co. v. Phillips Petroleum Co.*, 930 F.2d 1342 (8th Cir. 1991), and the Eleventh Circuit, *American Employers Ins. Co. v. Southern Seeding Services, Inc.*, 931 F.2d 1453 (11th Cir. 1991), have all reversed punitive damages awards in diversity cases because of the absence of any "detailed and substantive" review of the verdicts of the type approved in *Haslip.*

In *Hugo's Skateway*, the Fourth Circuit reviewed a jury's punitive damages award made in a diversity case applying Virginia law. The jury's punitive award had been checked only by the district court's limited post-trial review of the award under the "excessiveness" standard that had drawn fire from the Supreme Court in *Browning Ferris, Bankers Life*, and again in footnote 10 of *Haslip.* In remanding the punitive damages award to the district court for full examination of the award under the rigorous *Haslip* standards, the Fourth Circuit observed:

> There can be little doubt that the Virginia standard is far more analogous to the schemes rejected by the *Haslip* Court in footnote 10 than they are to the Alabama scheme. We are therefore left inevitably to conclude that in order to comport with the due process requirements of the Fifth Amendment, post-trial and appellate review of punitive damage awards in the federal courts of the Fourth Circuit, based upon state statutes and common law, can no longer be conducted under Virginia's "excessiveness" standard but must instead proceed under standards similar to those enunciated by the Alabama courts in *Hammond, Green Oil*, and *Central Alabama.*

949 F.2d at 1353-54.

Similarly, the Eighth Circuit has remanded several post-*Haslip* punitive damages awards which district

courts reviewed only for "excessiveness" and "jury passion or prejudice" for the more exacting review under the criteria approved in *Haslip*. *Robertson Oil Co. v. Phillips Petroleum Co.*, 930 F.2d 1342 (8th Cir. 1991); *Doe v. B.P.S. Guard Services, Inc.*, 945 F.2d 1422 (8th Cir. 1991); and *Union National Bank of Little Rock v. Mosbacher*, 933 F.2d 1440 (8th Cir. 1991), *cert. denied*, 112 S. Ct. 870 (1992).

The Eleventh Circuit also interprets *Haslip* as requiring detailed post-trial review in federal diversity cases. In *American Employers Insurance Co. v. Southern Seeding Services, Inc.*, 931 F.2d 1453 (11th Cir. 1991), the Eleventh Circuit reviewed a punitive damages award made by an Alabama jury in a federal diversity case. As in the *Haslip* case, Alabama substantive law applied to plaintiff's claims. The Court remanded the case to the district court for full consideration of the *Hammond* and *Green Oil* factors that the Supreme Court approved in *Haslip*. *Id.* at 1458.

There is a third, distinctive, approach in the circuits: *Mattison v. Dallas Carrier Corp.*, 947 F.2d 95 (4th Cir. 1991). There, Judge Niemeyer, joined by Chief Judge Ervin, reversed a punitive damages award in a diversity action under South Carolina law and ordered a new trial, with the jury to be fully instructed on the *Haslip* standards. The court interpreted footnote 10 in *Haslip* as follows:

> While the Supreme Court in *Haslip* did not say as much, the inference is left that the broad discretion given juries under the laws of Vermont and Mississippi is not adequately checked by court review based on a standard of excessiveness. This same inference is applicable to the South Carolina scheme, where the . . . standard for court review [is] similar.

Id. at 105. The Fourth Circuit drew the conclusion that "[a]pparently, the Court in *Haslip* concurs in the assess-

ment that a standard of 'excessiveness' is not meaningful." *Id.* at 106. The court, however, found that in diversity cases the Seventh Amendment and Fed. R. Civ. P. 59 preclude the type of post-verdict review approved in *Haslip* in the state court context: "A *Haslip*-type post-trial review, insofar as it is a quasi *de novo* review by which the court reviews facts, *some of which may have not been presented to the jury*, would be inconsistent with the restrictions of the Seventh Amendment." *Id.* at 108 (emphasis added). The court's solution to the Fifth Amendment/Seventh Amendment dilemma was to direct the district court on remand to instruct the jury on the *Haslip* standards. *Id.* at 109. *See Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 492 U.S. at 279 n.25 (Supreme Court has never held that the Seventh Amendment allows appellate review of a district court's denial of a motion to set aside an award as excessive).

The Tenth Circuit's decision here underscores the significance of the tripartite conflict in the circuits, because the punitive damages award could survive appellate review only under a traditional "shock the conscience" standard. Under a *Haslip* post-verdict review in the Fourth or the Eighth Circuits, the award certainly would have been struck down, and, under a *Mattison* approach, a properly instructed jury would likely have returned a dramatically different verdict.

The instruction given the jury here in fact permitted the jury virtually unlimited discretion in fixing the amount of punitive damages. *See* Punitive Damages Instruction, App. 174a. The only "guidance" the district court gave the jury concerning the amount of punitive damages was as follows:

> Any punitive damages that you award must bear some relationship to the injuries inflicted, but need not bear any relation to the amount of actual damages awarded.
>
> In determining the amount of punitive damages, you should consider the nature, extent and enormity

> of the wrong, the intent with which it was committed, and all of the circumstances surrounding the defendant's act, including plaintiff's time and expense of litigation.
>
> You may consider the financial worth of the defendant against whom such damages are awarded in determining the size of an award that is proper under the facts of this case.

Id., App. 175a.

Notably absent from this instruction is any guidance to the jury concerning a reasonable range of damages sufficient to meet the goal of punishment or deterrence, or what bounds exist on the 'relationship" that the award must bear to actual damages—in fact the jury was told the award "need not bear any relation to the amount of actual damages awarded." *Id. See Haslip*, 111 S. Ct. at 1045 (approving the Alabama requirement that there be "some understandable relationship" between compensatory damages and punitive damages). Of a similar instruction, Justice Scalia commented "[t]hat is not guidance but platitude." *Id.* at 1053 (Scalia, J., concurring).

The absence of meaningful instructions on the appropriate amount of punitive damages must be evaluated in the context of the evidence of Texaco's wealth that went to the jury. Unlike the law in Alabama, where as this Court stated plaintiffs "do not enjoy a windfall because they have the good fortune to have a defendant with deep pockets," *id.* at 1045, the Plaintiff here took full advantage of her "good fortune." The jury heard evidence from Texaco's 1988 Annual Report showing company-wide revenues exceeding $35 billion, net worth exceeding $8 billion, and net profit of $1.3 billion. At the same time, however, the district court *excluded* Texaco's evidence of its relatively small profit from selling benzene—the only Texaco product at issue. App. 125a. *See Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 270 (1981) (noting that

"evidence of a tortfeasor's wealth is traditionally admissible as a measure of the amount of punitive damages" but recognizing potential for "prejudicial impact on the jury").

Thus, the district court's instruction to the jury to consider Texaco's wealth in fixing the amount of punitive damages, while excluding evidence of the profit derived from the course of conduct at issue, was directly in conflict with Alabama law applied in *Haslip* where "any evidence of Pacific Mutual's wealth was excluded" 111 S. Ct. at 1044; *see Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 492 U.S. at 278 n.24 (1989) (admission of net worth evidence is substantive law of state to be applied in federal diversity case). Rather, this Court approved Alabama's approach of considering "the profitability to the defendant of the wrongful conduct and the desirability of removing that profit and of having the defendant also sustain a loss." 111 S. Ct. at 1045. *See generally* 2 American Law Institute, *Enterprise Liability for Personal Injury*, 254 (1991) (Reporters' Study) ("in determining the size of the [punitive damages] award that is sufficient . . ., what is relevant is not the defendant's *overall* wealth, but rather the profit that it realized from the particular tortious activity in question.").

The prejudicial evidence of wealth that the jury heard showed Texaco's financial situation in 1988—longer than a decade after the conduct that was found to have harmed Mr. Mason. This arbitrary use of wealth before the jury, "in effect encouraging it to impose a sizeable award," *Fact Concerns*, 453 U.S. at 270, violates due process under the principles announced in *Haslip*. Texaco was thus deprived of a very important check on unrestrained jury discretion.

Punitive damages should not be the product of a successful spin of the roulette wheel: zero today, $25 million tomorrow. Conduct judged by one jury as insufficient to warrant punitive damages should not be punished to the

tune of $25,000,000 by a second jury. As Justice Kennedy noted in his concurring opinion in *Haslip*, "nonuniformity cannot be equated with constitutional infirmity," 111 S. Ct. at 1055, but it is nonetheless true that a judicial system that tolerates the degree of "disparate outcomes," *id.*, displayed in this case must be a system that tolerates injustice.

Had this case been brought against Texaco in the Fourth, Eighth, or Eleventh Circuits, Texaco would have at least received meaningful application of the *Haslip* factors, either through the instructions to the jury or through rigorous judicial scrutiny of the award. This Court should grant certiorari to resolve the conflict in the circuits and assure that important due process safeguards are no longer dependent on the accident of geography.

III. THIS COURT SHOULD RESOLVE THE CONFLICT AMONG THE CIRCUITS ON THE EFFECT OF A PARTY'S FAILURE TO CROSS-APPEAL

Justice Cardozo held in *Morley Construction Co. v. Maryland Casualty Co.*, 300 U.S. 185, 191 (1937), that an appellee may not, in the absence of a cross-appeal, attack a judgment "with a view either to enlarging his own rights or of lessening the rights of his adversary" (quoting *United States v. American Ry. Express Co.*, 265 U.S. 425, 435 (1924) (Brandeis, J.)). Justice Cardozo's holding has an important rationale: "Failure to follow this rule would lead to the bizarre result, as stated admirably by Judge Friendly, 'that a party who has chose not to argue a point on a first appeal should stand better . . . than one who had argued and lost.'" *Laffey v. Northwest Airlines*, 740 F.2d 1071, 1089-90 (D.C. Cir. 1984) (per curiam) (quoting *Fogel v. Chestnutt*, 668 F.2d 100, 109 (2d Cir. 1981) (Friendly, J.), *cert. denied*, 469 U.S. 1181 (1985)); *see Washington Post Co. v. HHS*, 865 F.2d 320, 327 n.9 (D.C. Cir. 1989) ("[T]he whole point of the rule . . . is to require that all viable arguments be vigorously pursued throughout the proceeding . . . rather than per-

mitting parties to pick and choose which claims will be presented on appeal and which will be held back until a later time.").

In the first trial here, the jury rejected Plaintiff's claim for punitive damages. She moved for a new trial on this claim, which was denied. She did not appeal. Following remand after *Mason I*, the district court ruled that Plaintiff could retry her claim for punitive damages in the second trial. App. 132a. Texaco objected on the ground that Plaintiff had appealed neither the adverse jury verdict, nor the denial of her motion for a new trial, and therefore the jury's verdict had become final. (Indeed, Texaco sought a writ of mandamus from the Tenth Circuit on this issue, which was denied. App. 128a.)

On appeal from the second trial, the Tenth Circuit affirmed the district court's decision to permit relitigation of punitive damages, following *Wheeler v. John Deere Co.*, 935 F.2d 1090 (10th Cir. 1991). The court reasoned that the remand from *Mason I* contemplated a new trial on all factual issues. App. 11a; 948 F.2d at 1552. This holding conflicts with decisions by the Fourth and Eighth Circuits. *Bethea v. Levi Strauss & Co.*, 916 F.2d 453 (8th Cir. 1990); *Arnold v. Eastern Air Lines*, 681 F.2d 186 (4th Cir. 1982), *cert. denied*, 460 U.S. 1102 (1983).

In *Bethea*, plaintiff Bethea brought an age discrimination claim against Levi Strauss. The jury returned a verdict for Bethea on his back pay claim, but the court denied his request for reinstatement or front pay. Levi Strauss appealed; Bethea did not. The Eighth Circuit reversed the jury verdict and remanded.

On remand, Bethea moved again for reinstatement, and this time the court granted the motion. Levi Strauss again appealed. The Eighth Circuit held that Bethea's failure to appeal was fatal to the reinstatement claim:

> [The district court] had no power to increase Bethea's award for the age discrimination claim.

> When the district court issued its final order, the matter was resolved as far as the district court was concerned. Levi Strauss' appeal effected a limited revival of the matter before the Eighth Circuit. By cross-appealing, Bethea could have broadened the scope of review to include the district court's denial of his request for further relief. Bethea's failure to do so limited the appellate court's options. . . . Therefore, on remand, the district court was subject to the same limits as the appellate court and had no authority to grant Bethea further relief.

916 F.2d at 457. *See National Farmers' Organization, Inc. v. Associated Milk Producers, Inc.*, 850 F.2d 1286, 1310-11 (8th Cir. 1988), *cert. denied*, 109 S. Ct. 1535 (1989).

The Fourth Circuit in *Arnold v. Eastern Air Lines*, 681 F.2d 186 (4th Cir. 1982), *cert. denied*, 460 U.S. 1102 (1983), applied the doctrine of law of the case to reach a conclusion consistent with that in *Bethea* and in conflict with *Mason II*. In *Arnold*, a defendant appealed from an award of compensatory damages. The plaintiff, which had moved for a new trial on the question of punitive damages, chose neither to appeal nor cross-appeal. Plaintiff, however, did manifest an intent to retry punitive damages on remand. The Fourth Circuit held that retrial of that claim, decided and not appealed, was improper:

> The sole issue before the district court upon remand is that of compensatory damages. The district court's suggestion that if a new trial were ordered on appeal it would be conducted as to both punitive damage liability and compensatory damages is of no force. The district court denied plaintiffs' motion for a new trial on the punitive damages liability issue, and plaintiffs did not appeal from that order. *This ruling, unappealed, was not in consequence subject to defense by Eastern on appeal and Eastern is entitled to have it treated as law of the case.*

681 F.2d at 206 n.22 (emphasis added).

The D.C., Third, and Ninth Circuits reach results consistent with those in the Fourth and Eighth Circuits. *Laffey*, 740 F.2d at 1089-90 (failure to challenge the formula for backpay on the first appeal resulted in the appellate court's affirmance of that portion of the district court order, and the inclusion of the formula in the law of the case); *Washington Post Co.*, 865 F.2d 320 (D.C. Cir. 1989) (party could not raise anew on remand issue that it failed to pursue in appeal); *Habecker v. Clark Equipment Co.*, 942 F.2d 210, 218 (3d Cir. 1991) (issues eliminated by district court's earlier orders, not pursued on appeal, could not be revived on remand); *Alioto v. Cowles Communications, Inc.*, 623 F.2d 616, 618 (9th Cir. 1980) ("By failing to challenge the special verdict on the earlier appeal . . . defendant waived any right to question the second jury's findings on this appeal.").

The Seventh Circuit and the Federal Circuit, on the other hand, have adopted positions much closer to that of the Tenth Circuit in *Mason II* and *Wheeler*. *Gertz v. Robert Welch, Inc.*, 680 F.2d 527, 533 (7th Cir. 1982), *cert. denied*, 459 U.S. 1226 (1983) ("The [Supreme] Court's mandate clearly includes retrial on all liability issues, including the question of actual malice."); *Exxon Corp. v. United States*, 931 F.2d 874, 877 (Fed. Cir. 1991) (claims court on remand was not required to adhere to its own previous rulings regarding factual issues because the rulings had "not been adopted, explicitly or implicitly, by the appellate court's judgment").

In *Mason II*, the Tenth Circuit held that "the entire issue of liability was subject to retrial" after *Mason I*, and that the punitive damages claim was "part and parcel of a liability determination" and was not an "issue separate from the balance of plaintiff's case." App. 14a; 948 F.2d at 1554. Certainly *Plaintiff* did not agree that liability for compensatory and punitive damages was such a unitary issue that neither could be tried separately: after all, she moved for a new trial on punitive damages alone following the first trial.

The net effect of the Tenth and Seventh Circuits' approach to the issue is clear: litigants like Texaco, who prevail at trial can lose on appeal without ever having the opportunity to be heard. In *Mason I*, the Plaintiff had a full and fair opportunity to litigate her punitive damage claim. She lost. She moved for a new trial on punitive damages, which the district court denied. She did not appeal either the jury's verdict or the district court's denial of her motion for new trial. In Texaco's appeal from the compensatory damage verdict, Plaintiff did not, and indeed could not in the absence of a cross-appeal, challenge the result on punitive damages. The Tenth Circuit in *Mason I* addressed absolutely nothing to do with the propriety of the verdict on the punitive damage claim. Consequently, the Tenth Circuit was in error to affirm the resurrection of that claim.

CONCLUSION

For the reasons stated above, Texaco Inc. requests this Court issue a writ of certiorari to the Tenth Circuit.

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